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BOOK REVIEW

Belén Olmos Giupponi, *Trade Agreements, Investment Protection and Dispute Settlement in Latin America*, Wolters Kluwer, 2019, 413 pp, ISBN 9789041182333, €205
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The analysis of the Latin American states' relationship with international economic law has oscillated between those states being considered 'rebels without a cause',[1] outliers, forerunners and, in some instances, being dismissed altogether. After reading Olmos Giupponi's book on *Trade Agreements, Investment Protection and Dispute Settlement in Latin America*, one is left with the impression that the region's ambivalent approach to international economic law has led to rich and innovative practices worth replicating at an international level.

This monograph provides a comprehensive mapping of the practice of Latin American states as regards trade and investment law. This is its main added value: there is no comprehensive and updated study in the field covering both trade and investment law, including dispute settlement, in Latin America. In the context of the backlash against international investment arbitration, UNCITRAL's discussions on the creation of a Multilateral Investment Court (MIC) and WTO dispute settlement being on the brink of collapse, an in-depth analysis of Latin American trade agreements, and their investment protection and dispute settlement provisions can shed plenty of light on a possible path forward. In a certain sense, the rebels are in reality forerunners. By focusing on describing the evolution of trade and investment agreements in the region, the book constitutes a very good example of what Prebisch meant when speaking about the position of Latin America vis-à-vis the creation of the 1944 Bretton Woods system: 'Why not search for our own principles when even traditional principles are suffering a severe critical revision'.[2] Yet, Olmos Giupponi seems unsure as to whether there is a Latin American approach to trade and investment law. Whilst the book seems to hint at recognizing a common approach,[3] and methodologically takes the view that there are some commonalities within the region (like open regionalism or their ambivalence towards investment law), it concludes that the practice is still too heterogenous to speak of a common approach.[4]

The book is divided into four parts. The first sets out the analytical and conceptual framework that will inform the rest of the monograph, giving special prominence to international dispute settlement in international economic law. As Olmos Giupponi acknowledges, Latin American countries have played a decisive role in shaping the contemporary law of international dispute settlement, not only in the areas of international trade and investment but in public international

[1]B. Olmos Giupponi, *Trade Agreements, Investment Protection and Dispute Settlement in Latin America* (2019), at 36.
[2]Quoted in V. R. Fernández and G. Brondino, *Development in Latin America: Critical Discussions from the Periphery* (2019), at 1.
[3]Olmos Giupponi, *supra* note 1, at 4.
[4]Ibid., at 409.

law as a whole.[5] Hence, it makes plenty of sense to adopt this focus. Chapter 1 focuses on the inherent complexities concerning dispute settlement in the region highlighting the evolution of international economic law and placing it within the international and inter-American contexts. This chapter also serves as an explanation to the author's decision to limit the book's scope to trade, investment and dispute settlement issues in regional trade agreements (RTAs) as they have formed a constant feature of Latin American international trade policy.[6] Even realms that were traditionally outside the scope of RTAs (i.e., investment arbitration), have in recent years been included, as illustrated by the Union of South American Nations (UNASUR) and the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR).

The second part of the monograph focuses on the region's fraught relationship with investment arbitration. The usual narrative within the literature identifies how Latin American states started to withdraw from ICSID (even though there were only three states that actually withdrew) because, first, they started losing investment disputes[7] and, second, the Pink Tide of the 2000s swept into power politicians with 'populist' agendas against the Washington Consensus.[8] Around this time the ghost of Carlos Calvo made a comeback in international economic law scholarship.[9] Yet, the monograph departs from this narrative. Instead, it shows the inherent tension within Latin America's political economy. While Latin America has had a need to attract investment flows due to its extractivist and commodity-based economies, the history of Latin America has made those states reluctant to engage with international investment instruments. For instance, though ICSID was established in 1966, Latin American states only started signing *en masse*[10] in the 90s, with Mexico only joining ICSID in 2018.[11] Thus, when put against a larger historical context, the 90s should be seen as an outlier. This is also reflected in the scant number of bilateral investment treaties (BITs) signed within the region, for instance, only 21 signed between the UNASUR countries (Colombia, Venezuela, Ecuador, Peru, Brazil, Paraguay, Uruguay, Argentina and Chile[12]).

Placed within this overall context, it would seem logical that the reaction or backlash against investment arbitration would have been one of total retreat from the system. Yet, as this book shows, the backlash against investment arbitration lead to *a more proactive and constructive stance* towards it. Latin American countries have been actively trying to reform investment arbitration instead of merely disengaging from the system altogether. This is exemplified by the new model BITs that have been developed in the region, such as the Colombian model BIT[13] and the recent Ecuadorian model BIT,[14] or the proposal to establish a Latin American Centre for the Settlement

[5]Ibid., at 13.

[6]Ibid., at 25.

[7]M. N. Hodgson, 'Reform and Adaptation: The Experience of the Americas with International Investment Law', (2020) 21 *The Journal of World Investment & Trade* 140.

[8]A. Titi, 'Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas', (2014) 30 *Arbitration International* 357, at 363.

[9]See B. M. Cremades, 'Resurgence of the Calvo Doctrine in Latin America', (2006) 7 *Business Law International* 53; S. Montt, 'What International Investment Law and Latin America Can and Should Demand from Each Other. Updating the Bello/Calvo Doctrine in the BIT Generation', (2007) 3 *Res Publica Argentina* 75; W. Shan, 'Is Calvo Dead?', (2007) 55 *American Journal of Comparative Law* 123; R. Polanco Lazo, 'The no of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine', (2015) 30 *ICSID Review-Foreign Investment Law Journal* 172; P. Juillard, 'Calvo Doctrine/Calvo Clause', (2007) *Max Planck Encyclopedia of Public International Law*; O.M. Garibaldi, 'Carlos Calvo Redivivus: The Rediscovery of the Calvo Doctrine in the Era of Investment Treaties', (2006) 3 *Transnational Dispute Management* 1; O. E. García-Bolívar, 'Sovereignty vs. Investment protection: back to Calvo?', (2009) 24 *ICSID Review* 464.

[10]Olmos Giupponi, *supra* note 1, at 94–5.

[11]Ibid., at 177.

[12]Ibid., at 57.

[13]Ibid., at 55.

[14]'Ecuador Model BIT Gives State Space to Regulate', *Global Arbitration Review*, 16 March 2018, available at globalarbitrationreview.com/article/1166677/ecuador-model-bit-gives-state-space-to-regulate.

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of Investment Disputes under the auspices of UNASUR (UNASUR Centre).[15] These proposals, as well as many others within the region (like the Brazilian approach which combines dispute prevention mechanisms, and state-to-state arbitration while excluding investor-state dispute settlement),[16] should be seen as, at least, crucial inputs in the UNCITRAL discussions on the establishment of a MIC.[17] By way of example, the UNASUR Centre included the possibility of an appeal on broader grounds than the annulment action in ICSID.[18] Likewise, the CAFTA-DR required the creation of an appellate body.[19] These important reforms should be at the forefront of the UNCITRAL process. Yet, the fact that they are not could be easily explained by the tendency to regard the practice of the Global South as outlier.[20]

The third part of the monograph examines the legal framework governing the trade relations in Latin America. It does so by first establishing the relationship between Latin America and the WTO and then moving on to lay down the RTAs basic features as regards trade.

Chapter 4 provides some very interesting data that sheds light on the role of the WTO in relation to Latin America. Intra-Latin American disputes amount to 5 per cent of the cases lodged in the WTO Dispute Settlement Mechanism (DSM).[21] Moreover, the two biggest economies in Latin America have only lodged three complaints against each other.[22] Adding the fact that more than two-thirds of the disputes initiated by Latin American states were against states outside of the region, one could conclude that the web of RTAs that cover the region are serving their purpose in managing trade relations within the region. However, the monograph concludes its analysis by reaching the opposite conclusion: '*the analysis reveals a preference for the multilateral over the regional mechanisms articulated within regional agreements*'.[23] Whilst not many disputes have been brought under Latin American RTAs, this could be seen as a sign that the parties are generally complying with the terms of the RTAS, as dispute settlement is the last resort to which parties of an agreement avail themselves. Within Latin America, there seems to be a correlation between having your trade relations governed by an RTA and refraining from bringing a trade dispute to the WTO DSM against another Latin American state. For instance, there has never been a WTO dispute between Andean Community member states, the same can be said about SICA (Central American Integration System), and only one case between CAFTA-DR members about a series of issues that pre-dated the RTA.[24] In fact, the disputes between Latin American states seem to arise whenever there is no RTA in place. In this sense, it will be interesting to see whether the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTTP) will continue to advance this trend in reducing the number of cases between Latin American states parties to the mega-regional but not linked through another RTA.

The fourth part of the monograph tries to disentangle Latin America's spaghetti bowl of RTAs. Each of the chapters of this part is dedicated to a different RTA, providing a comprehensive analysis of the dispute settlement provisions contained therein. Yet, one of the RTAs stands out, NAFTA. Unlike the other agreements analysed in the monograph, to NAFTA, only Mexico is a party. Yet, this choice should have been explained further by the author. It is not clear whether

[15]Olmos Giupponi, *supra* note 1, at 385.

[16]G. Vidigal and B. Stevens, 'Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?', (2018) 19 *Journal of World Investment & Trade* 475, at 475.

[17]Olmos Giupponi, *supra* note 1, at 63–76.

[18]Ibid., at 388.

[19]Ibid., at 220. At the time of writing the appellate body has yet to be established.

[20]Cf. K. Greenman, 'Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels', (2018) 31 *Leiden Journal of International Law* 617.

[21]Olmos Giupponi, *supra* note 1, at 128.

[22]Ibid., at 130.

[23]Ibid., at 135.

[24]C. P. Bown and M. Wu, 'Safeguards and the perils of preferential trade agreements: Dominican Republic–Safeguard Measures', (2014) 13 *World Trade Review* 179.

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the topics and issues that NAFTA confronts have the same importance in the other RTAs and vice versa. The other RTAs examined in this part fit an open regionalist approach[25] where RTAs go beyond trade liberalization to include labour issues, even when it comes to dispute settlement (CAFTA-DR), place trade within a bigger picture of political integration process (SICA, Andean Community, Mercosur), or are a clear reaction to previous trade and investment policies applied in Latin America (UNASUR).

Olmos Giupponi's monograph demonstrates that international trade and investment law in Latin America cannot be regarded as an outlier. Instead, the monograph shows that the current debates regarding international disputes settlement in trade and investment being discussed at global level have already been addressed in treaty-making in Latin America. Trade agreements have already included non-trade values subject to remedies through dispute settlement. Likewise, investment agreements already provided for the possibility of an appellate review.

Overall, this book should be compulsory reading for all international lawyers so that they would know that international economic law is not only made in Geneva and Washington, but there are other perspectives that should inform the global debate about the trajectory of our discipline in these uncertain times.

*Andrés Delgado Casteleiro**

[25]Olmos Giupponi, *supra* note 1, at 159.

*Law Faculty, Universidad Autónoma de Chile [andres.delgado@uautonoma.cl].

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